

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIUS JEROME MASON,

Defendant and Appellant.

C086337

(Super. Ct. No. CRF150171)

Following the denial of his motion to suppress, defendant Darius Jerome Mason pleaded no contest to numerous counts of illegal firearm and ammunition possession and misdemeanor resisting arrest. On appeal, he contends his trial counsel rendered ineffective assistance of counsel in litigating the motion to suppress. Specifically, he contends trial counsel was ineffective for failing to obtain video footage prior to the traffic stop and using that footage as a basis to challenge the stop. We find counsel's performance was not deficient and affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Prior to the preliminary hearing, defendant filed a motion to suppress evidence under Penal Code section 1538.5.¹ The motion was heard as part of the preliminary hearing.

Yolo County Deputy Sheriff Dirk Leonard was parked near the Cache Creek Casino doing paperwork when a silver Pontiac with dealer plates drove by him. He followed the Pontiac, maneuvering to determine if it had a temporary operating permit but could not see one. Because there were no good places to stop the Pontiac, he followed it for almost four miles on the highway. Eventually, Leonard turned on his enforcement lights and the driver, defendant, pulled over. Activating the enforcement lights also activated the patrol car's video recording camera.

As Leonard approached the car, he could smell the odor of marijuana coming from inside the car. Defendant opened his window about two inches and Leonard asked him to open it further. Then Leonard saw a temporary registration sticker in the bottom right corner of the windshield. Leonard asked defendant for his driver's license, registration, and insurance. Defendant was nervous, his voice trembling and hands shaking, and he was furtive as he looked for the documents. Defendant opened the center console and found his driver's license. When he opened the center console, Leonard saw a digital scale inside. Defendant also produced a sales contract and told Leonard he had recently purchased the car. Leonard confirmed through a records check the Pontiac belonged to defendant.

While running the records check, Leonard spoke with defendant and asked him about the smell of marijuana. Defendant denied he had any marijuana in the car. About five minutes after the initial stop, Leonard asked defendant to get out of the car. Leonard

¹ Undesignated statutory references are to the Penal Code.

believed he had probable cause to arrest defendant due to the smell of marijuana.

Defendant got out of the car, and after telling Leonard he had previously been arrested on weapons charges and criminal threats, he ran away. Leonard briefly pursued defendant, and then stopped for safety reasons. Deputy Ceja and Lieutenant Martin Torres arrived at the scene and found defendant approximately two miles from the stop location.

Based on the strong smell of marijuana when Torres opened the driver's side door, defendant running from the scene, concerns there might be a gun, and the fact that they were going to have the Pontiac towed, Torres decided to have Leonard and Ceja search the car.² During the search, the officers found a loaded illegal AR-15 assault rifle, a 100-round drum magazine, a prescription bottle, a digital scale, two marijuana grinders, a cell phone, two glass jars, and a total of just over three grams of marijuana. They also found both license plates and the current registration for the Pontiac in the trunk.

The magistrate denied the motion to suppress and held defendant to answer. The prosecution filed an information charging defendant with possession of an assault weapon (§ 30605, subd. (a)—count 1); being a felon in possession of a firearm (§ 29800, subd. (a)(1)—count 2); possession of ammunition by a person prohibited from possessing a firearm (§ 30305, subd. (a)—count 3); two counts of importing a large capacity magazine (§ 32310—counts 4 and 5); and, resisting a peace officer (§ 148, subd. (a)(1)—count 6). The information also alleged defendant had sustained a prior serious felony conviction (§ 667, subds. (c) and (e)(1)) and served two prior prison terms (§ 667.5, subd. (b)).

Prior to trial, defendant made two *Marsden*³ motions seeking appointment of new counsel. The trial court denied both motions.

² The prosecutor did not attempt to justify the search as an inventory search.

³ *People v. Marsden* (1970) 2 Cal.3d 118.

In the first *Marsden* motion, defendant stated he had repeatedly informed defense counsel it was vital to get video footage from Cache Creek Casino. He claimed the video would show that when defendant left the casino parking lot, it was broad daylight and he was behind the sheriff “[t]he whole time.” Defense counsel responded that after the suppression hearing, he had asked the casino about the video, as did defendant, but the casino did not retain it. He added that even if the casino’s video footage showed the scene as defendant described, it would not have changed the outcome of the motion to suppress, as counsel would not have been able to demonstrate from the video that Leonard was looking at defendant’s front windshield. Counsel also stated he researched the issue of vehicle stops involving vehicles driven with temporary operating permits in a window and did not believe there was any reason to suppress the car stop in this case. The trial court denied the motion.

In the second *Marsden* motion, defendant again raised the issue of counsel failing to obtain the video footage from the casino to support the motion to suppress. Defense counsel reiterated he had requested the video after the suppression hearing, but it was too late to get it. And, he reiterated the video would not have made a difference in the motion, because he would not have been able to demonstrate where Leonard was looking as the cars passed, and the video would not demonstrate Leonard saw the temporary registration sticker prior to making the stop. Defense counsel explained he was familiar with the casino surveillance, and knew that it was positioned too far away to establish what Leonard was looking at when defendant passed or that Leonard could see the temporary sticker in the front window. In his legal opinion, Leonard had a right to stop defendant to investigate the registration of the car. The trial court denied the second motion. Subsequently, the trial court granted defendant’s request to represent himself.

Defendant renewed his motion to suppress. The trial court denied the renewed motion. Defendant moved to set aside the information under section 995. The trial court denied that motion, as well.

Defendant pleaded no contest to all counts and admitted the enhancement allegations in exchange for a stipulated sentence of five years four months, and sentencing on two unrelated cases, for a total term of 13 years four months. Defendant expressly reserved the right to appeal the denial of his motion to suppress as part of the plea agreement. The trial court sentenced defendant in accordance with the plea to an aggregate term of 13 years four months.

DISCUSSION

Defendant contends his trial counsel failed to competently litigate the motion to suppress by failing to obtain the casino surveillance video to challenge the initial stop, not just the subsequent search. He contends counsel's failure to seek the casino video until after the suppression hearing was a dereliction of his duty to promptly investigate and obtain critical impeachment evidence, rendering his performance deficient. We disagree.

A criminal defendant asserting his or her lawyer failed to deliver what the Constitution promises bears the burden of proving the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and that it is reasonably likely the result would have been different if the lawyer's performance was up to par. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674].) Reasonably competent assistance includes a criminal defense attorney's " 'diligence and active participation in the full and effective preparation of his client's case' " and carefully investigating all defenses available to defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 424-425, disapproved on a different ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) "If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine 'whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate.' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.) "[W]here the record shows that counsel's omissions resulted from an informed

tactical choice within the range of reasonable competence, the conviction must be affirmed.” (*Pope*, at p. 425.)

Counsel indicated based on his familiarity with the casino surveillance system, it would not have demonstrated Leonard could see the temporary registration in the front window. Moreover, the video would not have been able to establish what Leonard, who was doing paperwork at the time, actually saw as defendant’s car passed his. Specifically, it would not have established that prior to stopping defendant, Leonard saw the temporary registration sticker. At most, the video would have demonstrated an error in Leonard’s testimony as to the relative positions of his and defendant’s car, but even such a challenge to Leonard’s recollections would not have made it more likely that Leonard was being untruthful in his testimony that he did not see the temporary registration before stopping defendant. Having concluded the video would not demonstrate Leonard in fact saw the temporary registration before making the stop, defense counsel correctly concluded that Leonard could legally stop defendant to investigate the vehicle registration. (*In re Raymond C.* (2008) 45 Cal.4th 303, 306-307; *People v. Dotson* (2009) 179 Cal.App.4th 1045, 1052.)

This record contains an explanation for defense counsel’s failure to obtain the casino video and challenge the stop. He did not obtain the video because given his familiarity with the casino surveillance, he did not believe the video would demonstrate what Leonard could and did see from inside his patrol car. And, he did not challenge the traffic stop because in his legal opinion, Leonard had a right to stop defendant and investigate the vehicle registration. This explanation demonstrates counsel’s omissions were the result of an informed tactical choice within the range of reasonable competence. We find this explanation demonstrates counsel was reasonably competent and acting as a conscientious and diligent advocate. Accordingly, we must affirm.

DISPOSITION

We affirm the judgment.

RAYE, P. J.

We concur:

ROBIE, J.

KRAUSE, J.